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Southwest Regional Council of Carpenters, Southern California Conference of Carpenters, United Brotherhood of Carpenters & Joiners of America *and* Tangram Flooring, Inc. and Painters and Allied Trades District Council 36, International Brotherhood of Painters and Allied Trades, AFL–CIO, CLC. Case 21–CD–675

November 6, 2009

DECISION AND DETERMINATION OF DISPUTE

BY CHAIRMAN LIEBMAN AND MEMBER SCHAUMBER

This is a jurisdictional dispute proceeding under Section 10(k) of the National Labor Relations Act (the Act). Tangram Flooring, Inc. (the Employer) filed a charge on April 6, 2009, alleging that Southwest Regional Council of Carpenters, Southern California Conference of Carpenters, United Brotherhood of Carpenters & Joiners of America (Carpenters) violated Section 8(b)(4)(D) of the Act by engaging in proscribed activity with an object of forcing the Employer to assign certain work to employees represented by Carpenters rather than to employees represented by Painters and Allied Trades District Council 36, International Brotherhood of Painters and Allied Trades, AFL–CIO, CLC (Painters). The hearing was held June 8–10, 2009, before Hearing Officer Cecelia Valentine. Thereafter, the Employer, Carpenters, and Painters each filed a posthearing brief.

The National Labor Relations Board[1] affirms the hearing officer's rulings, finding them free from prejudicial error. On the entire record, the Board makes the following findings.

[1] Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Liebman and Member Schaumber constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act. See *Snell Island SNF LLC v. NLRB*, 568 F.3d 410 (2d Cir. 2009), petition for cert. filed 78 U.S.L.W. 3130 (U.S. September 11, 2009) (No. 09-328); *New Process Steel v. NLRB*, 564 F.3d 840 (7th Cir. 2009), cert. granted __ S.Ct. __ , 2009 WL 1468482 (U.S. Nov. 2, 2009); *Northeastern Land Services v. NLRB*, 560 F.3d 36 (1st Cir. 2009), petition for cert. filed 78 U.S.L.W. 3098 (U.S. August 18, 2009) (No. 09-213). But see *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469 (D.C. Cir. 2009), petition for cert. filed, __U.S.L.W.__ (U.S. September 29, 2009) (No. 09-377).

I. JURISDICTION

The Employer is a California company engaged in the business of commercial floor covering installation. The parties stipulated, and we find, that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that Carpenters and Painters are labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. Background and Facts of the Dispute

The Employer commenced operations in June 2008. On August 21, 2008, the Employer signed a memorandum agreement with Carpenters, agreeing to recognize and bargain with Carpenters as the exclusive representative of its employees and to adhere to the terms of Carpenters' master labor agreement. The memorandum agreement specifically covers "all work in connection with the installation of floor coverings (with the exception of wood floors which are covered by the master labor agreement) such as measuring, cutting, installing, or removal and all other preparation for installation of all types of floor covering." The Employer does not have a collective-bargaining agreement with Painters.

Shortly after signing with Carpenters, the Employer's vice president, David Teper, received a visit from Painters' representative Vince Ramos. Teper testified that during that conversation Ramos asked Teper why the Employer signed with Carpenters and stated, "You understand you're starting a war?" Teper also testified that Ramos told him that the Employer should have signed with Painters.

In October and November 2008, the Employer requested that Carpenters dispatch employees to the Employer for a 2-day flooring project called the Pacific Life project. The dispatched employees were all enrolled in Carpenters' apprenticeship program in flooring installation. Teper testified that, upon commencing work at the Pacific Life project, he received calls from a customer and one of the Employer's sales people informing him that members of Painters were protesting the Employer's use of Carpenters-represented employees on the project, displaying a large inflatable rat and a sign reading "Shame on Tangram."

In March 2009, the Employer began work on a public works project at the Legacy Apartments in Hollywood, California, using employees represented by Carpenters. Individuals affiliated with Painters visited the jobsite, spoke with the Employer's employees, and displayed signs that read, "Shame on Tangram." Teper testified that he then contacted Ramos, and the two agreed to meet at the end of March 2009 to discuss Painters' ac-

tions. However, on March 27, 2009, prior to the scheduled meeting, Painters' attorney Ellen Greenstone telephoned Teper to discuss the matter. Teper testified that he asked Greenstone why Painters' members were picketing at the Employer's jobsites. Greenstone responded that they were not "picketing" but rather were "protesting," and she repeatedly told Teper to "read between the lines." Teper testified that he then asked Greenstone, "So, are you saying if I sign a contract with you, you and all your guys will go away," and Greenstone responded, "Yes."[2] Greenstone also told Teper that the scheduled meeting with Painters was cancelled.

Teper then emailed Carpenters' attorney, Daniel Shanley, informing him about his conversation with Greenstone. Teper testified that, shortly thereafter, he spoke with Shanley, asking whether it was "ok" to sign a contract with Painters. Shanley responded that if the Employer "signed any type of an agreement with [Painters] that [Carpenters] would strike, not just that project but every project." In an April 6, 2009 letter to James Larkin (the compliance supervisor for the Los Angeles Community Redevelopment Authority (CRA)), Shanley reported, "I have informed Tangram that the Carpenters Union will strike and picket the job should Tangram give the work covered by its collective bargaining agreement with the Carpenters Union to the Painters Union." In addition, Carpenters' contract administrator, Gordon Hubel, testified that he also told Teper that Carpenters would strike if the disputed work were reassigned.

On April 3, 2009, the general contractor for the Legacy Apartments project, Webcor Builders, received an email from CRA Official Larkin stating that he had been informed that Webcor Builders' subcontractor (the Employer) was planning on using "the carpenter trade" for carpet installation on the Legacy Apartments project. Larkin's email stated that this was an "unauthorized work trade" and that Webcor Builders must use "the authorized Carpet Layer/Resilient Tile Layer work classification." Larkin informed Webcor Builders that, to avoid assessments for violations of the California Labor Code, Webcor Builders must submit to the Southern California Resilient Floor & Decorative Covering JATC (Painters JATC)[3] a DAS-140 form, on which contractors on public works projects state that they will employ and train apprentices in accordance with California regulations.

Dan Burtle, business representative for Painters (and a trustee of Painters' JATC), testified about the requirements for compliance with the apprenticeship program. Burtle explained that when an employer begins work on a public works project, the general contractor signs a participation agreement and follows all regulations in Painters' master labor agreement. Burtle further testified that once a general contractor signs the participation agreement, all flooring employees dispatched would be members of Painters and remain under the jurisdiction of Painters during the course of the project. In addition, Burtle testified that all journeyman flooring employees must be members of Painters and work under the terms of Painters' master labor agreement.

On April 6, 2009, Greenstone wrote to the CRA on behalf of Painters JATC stating that the CRA's policies prevail over any collective-bargaining agreement between the Employer and Carpenters and that the CRA requires the Employer to use Painters JATC members to perform flooring work.

B. Work in Dispute

The parties did not stipulate to the work in dispute, as Painters contends that there is no dispute. The notice of hearing described the disputed work as "[t]he flooring installation being performed at the Legacy Apartments/The W Hotel in Hollywood, California."

C. Contentions of the Parties

Painters argues that the notice of hearing should be quashed, contending that it does not claim the work in dispute for employees it represents, but rather seeks compliance with the state apprenticeship law requiring that only members of the state-approved apprenticeship program perform work on public works (i.e., CRA) projects. Painters argues that Carpenters-represented employees are not approved to work on CRA projects, including the Legacy Apartments project at issue here. Painters thus contends that its protests at the Legacy Apartments jobsite were merely attempts to seek compliance with state apprenticeship standards, which require assignment of the work to employees represented by Painters. Painters also argues that the notice of hearing should be quashed because the parties are bound to the CRA project labor agreement, which requires that any jurisdictional disputes are to be resolved through an internal dispute resolution procedure.

Alternatively, Painters argues that, on the merits, the work should be awarded to employees it represents based on the factors of relative skills, area and industry practice, and economy and efficiency of operations.

Carpenters contends that there are competing claims for the work in dispute and that the dispute is properly

[2] Greenstone denied having said anything that linked the protests to the Employer signing a contract with Painters.

[3] David Romero, coordinator of the Painters JATC, testified that Painters JATC is a separate entity from Painters, but is funded by contributions made under collective-bargaining agreements between employers and Painters. Painters JATC is the only approved apprenticeship program for flooring installation for public works projects in the State of California.

before the Board for determination. Specifically, Carpenters contends that Painters claimed the work in dispute by Greenstone's statement to Teper that Painters' demonstrations would cease if the Employer signed a contract with Painters, by Painters' attempt to seek compliance with the state apprenticeship statute, and by Painters' refusal to disclaim the work during the hearing.[4] Carpenters contends that its own claim for the work in dispute, along with reasonable cause to believe Section 8(b)(4)(D) has been violated, is established by its threat to strike the Employer if it reassigned any of the flooring work to Painters. Carpenters further contends that there is no voluntary method for adjusting the dispute and, on the merits, argues that the factors of collective-bargaining agreements, employer preference and past practice, area and industry practice, relative skills, and economy and efficiency of operations support an award to employees it represents.

Finally, Carpenters contends that a broad award, covering all future projects by the Employer, is warranted because Painters can continue to use its claim of "apprenticeship enforcement" as a means to claim future work for the employees it represents. The Employer joins this request for a broad award, asserting that it is appropriate because Painters has expanded its campaign beyond the work in dispute.[5]

D. Applicability of the Statute

Before the Board may proceed with determining a dispute pursuant to Section 10(k) of the Act, there must be reasonable cause to believe that Section 8(b)(4)(D) has been violated. This standard requires finding that there is reasonable cause to believe that: (1) there are competing claims for the disputed work among rival groups of employees;[6] (2) a party has used proscribed means to enforce its claim to the work in dispute;[7] and (3) the parties have not agreed on a method for the voluntary adjustment of the dispute.[8] On the record, we find that this standard has been met.

1. Competing claims for work

We find Carpenters' claim for the disputed work is shown by the fact that employees it represents perform the disputed work, and by Shanley's and Hubel's statements to Teper that Carpenters would strike if the disputed flooring work were assigned to employees represented by Painters. See *Southwest Regional Council of Carpenters (Standard Drywall)*, 346 NLRB 478, 480 (2006).

We also find reasonable cause to believe that Painters has claimed the disputed work for employees it represents. As set forth above, Teper testified that during their March 27, 2009 telephone conversation, Greenstone affirmed that Painters' "demonstrations" at the jobsite would cease if the Employer signed a contract with Painters. In these circumstances, the demand for a contract constitutes a claim for the work in dispute. See generally *Carpenters St. Louis Council (Dooley Construction)*, 300 NLRB 878, 880 (1990) (rejecting the union's contention that seeking to enter into a collective-bargaining agreement with employer does not constitute a claim for work); *Southwest Regional Council of Carpenters (Standard Drywall)*, 348 NLRB 1250, 1253 (2006) (claim for work made by statement of union official that he would try to get a lawsuit dropped if the employer signed an agreement with the union covering projects in California). Although Painters disputes the validity of Teper's testimony in this regard, we find that it is sufficient to establish reasonable cause to believe that Painters made a claim for the disputed work. See *J. P. Patti Co.*, 332 NLRB 830, 832 (2000).[9]

Painters further argues that it merely sought compliance with the CRA's requirement that employees working on public works projects complete a state-approved apprenticeship program. We find this argument unavailing. In *Southwest Regional Council of Carpenters (Standard Drywall)*, 346 NLRB 478, 480–481 (2006), the Board found that a union's lawsuit that sought to require the employer to use apprentices trained by the union's state-approved apprenticeship program was not simply an effort to ensure the payment of prevailing wages but instead an attempt to require the employer to use employees represented by that union, and thus a

[4] Carpenters contends, moreover, that Painters' claim for the work in dispute is further demonstrated by the fact that it offered into evidence a 1942 jurisdictional award to Painters. Carpenters contends that Painters' attempt to use this award as precedent shows that it is seeking the disputed work.

[5] The Employer's posthearing brief does not address any of the other issues in this proceeding.

[6] *Carpenters Local 275 (Lymo Construction Co.)*, 334 NLRB 422, 423 (2001).

[7] See, e.g., *Electrical Workers Local 3 (Slattery Skanska, Inc.)*, 342 NLRB 173, 174 (2004).

[8] *Operating Engineers Local 150 (R&D Thiel)*, 345 NLRB 1137, 1138–1139 (2005).

[9] Painters' contends that the Board should credit Greenstone's testimony—in which she denied stating that the demonstrations would cease if the Employer signed a contract—over that of Teper. However, the Board need not rule on the credibility of testimony in order to proceed to the determination of a 10(k) dispute because the Board need only find reasonable cause to believe the statute has been violated. *Electrical Workers Local 363 (U.S. Information Systems)*, 326 NLRB 1382, 1383 (1998).

claim of jurisdiction over the disputed work.[10] Similarly, by invoking the CRA, the Painters sought to compel the hiring of employees in the state-approved Painters' JATC (employees represented by the Painters), and thereby effectively asserted a claim of jurisdiction over the work.[11] Therefore, we find that the record establishes reasonable cause to believe that there are competing claims for the work in dispute.[12]

2. Use of proscribed means

As noted above, Teper testified that Shanley stated that Carpenters would strike the Employer if it signed an agreement with Painters for the work in dispute or for any other project, and Hubel testified that he also told Teper that Carpenters would strike if the work in dispute were reassigned. On this basis, we find that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated.

3. No voluntary method of adjustment of dispute

Carpenters contends that there is no agreed-upon method for voluntary adjustment of the dispute.

Painters argues that there is a voluntary method for adjustment of the dispute, namely the CRA project labor agreement. That agreement, dated December 11, 2008, lists both Carpenters and Painters as local unions in its appendix, and it states that jurisdictional disputes shall be resolved through the Building and Construction Trades Department Plan. However, no representative of Carpenters signed the agreement.[13] Further, Hubel testified that Carpenters is not a member of the AFL–CIO Building and Trades Committee and is not a signatory to any project labor agreement with regard to the Legacy Apartments. In the absence of evidence that Carpenters signed any such project labor agreement, we find that there is no voluntary method for adjustment of this dispute.

Based on the foregoing, we find reasonable cause to believe that there are competing claims for the disputed work and that a violation of Section 8(b)(4)(D) has occurred, and that no voluntary method exists for the adjustment of the dispute. We therefore find that the dispute is properly before the Board for determination, and accordingly deny Painters' motion to quash the notice of hearing.

E. Merits of the Dispute

Section 10(k) requires the Board to make an affirmative award of disputed work after considering various factors. *NLRB v. Electrical Workers Local 1212 (Columbia Broadcasting)*, 364 U.S. 573 (1961). The Board has held that its determination in a jurisdictional dispute is an act of judgment based on common sense and experience, reached by balancing the factors involved in a particular case. *Machinists Lodge 1743 (J.A. Jones Construction)*, 135 NLRB 1402 (1962).

The following factors are relevant in making the determination of this dispute:

1. Certification and collective-bargaining agreements

There is no evidence of Board certifications concerning the employees involved in this dispute. The Employer is party to a memorandum agreement with Carpenters which incorporates a master labor agreement covering flooring work in 12 counties in Southern California. The Employer does not have a collective-bargaining agreement with Painters.[14] Accordingly, we find that this factor favors an award of the disputed work to employees represented by Carpenters.

2. Employer preference and past practice

The record shows that the Employer assigned the work in dispute to employees represented by Carpenters and has assigned similar work to this group of employees.[15] The Employer has not assigned work of the kind in dispute to employees represented by Painters.[16] Accordingly, we find that this factor favors an award of the disputed work to employees represented by Carpenters.

[10] The Board reaffirmed that finding in *Southwest Regional Council of Carpenters (Standard Drywall)*, 348 NLRB 1250, 1253 (2006).

[11] Moreover, we reject Painters' suggestion that our decision and determination of this dispute conflicts with the enforcement of California state law. Nothing herein addresses the merits of the contention of CRA Supervisor Larkin that Webcor, the general contractor at the Legacy Apartments jobsite, faced violating the California Labor Code unless Painters-represented employees were used.

[12] Because we find that Teper's testimony about his conversation with Greenstone establishes reasonable cause to believe that Painters made a claim for the disputed work, we find it unnecessary to address Carpenters' arguments that Painters' failure to disclaim the work at the hearing and its offering into evidence a copy of a 1942 jurisdictional award also constitute claims for the disputed work.

[13] The document contains numerous signatures on behalf of other labor organizations, including Painters.

[14] Although acknowledging it has no collective-bargaining agreement with the Employer, Painters argues that the Employer's collective-bargaining agreement with Carpenters is superseded by the CRA's project labor agreement. We find Painters' contention unavailing because, as noted above, Carpenters is not a party to that agreement.

[15] Teper testified that the Employer signed a contract with Carpenters because it "is a much stronger union than" Painters, and "offered a laundry list of things that was just a betterment for my employees." We do not rely on this testimony, as it does not demonstrate employer preference based on the "traditional factors relevant to awarding work in dispute." *Graphic Communications Workers Local 508M (Jos. Berning Printing)*, 331 NLRB 846, 848 (2000).

[16] Painters contends that a related company, Tangram Interiors, "appears to" have subcontracted to Painters' signatory contractors for a flooring project in 2007. However, there is no evidence either that Tangram Interiors signed a collective-bargaining agreement with Painters or that the Employer and Tangram Interiors are the same entity.

3. Area and industry practice

Hubel testified that Carpenters-represented employees perform flooring work for five or six other contractors in California and have performed flooring work throughout the United States and Canada for at least 20 years. Hubel also testified that Carpenters' master labor agreement, which applies to all of Carpenters' signatories, includes flooring work as part of Carpenters' general jurisdiction. Similarly, Painters' master labor agreement with the Floor Covering Association of Southern California covers all aspects of flooring installation. Burtle testified that 37 employers in Southern California are signatories to Painters' master labor agreement, as are a large number of contractors throughout the United States.

We find that the record shows an area and industry practice of using both groups of employees to perform work of the kind in dispute. Therefore, we find that this factor favors neither group of employees.

4. Relative skills

Both Painters and Carpenters presented evidence as to their training and apprenticeship programs. Hubel testified that Carpenters has a nationwide training center in Las Vegas, Nevada, and trains apprentices in flooring according to its own internal standards, some of which are approved by the State of California and others that are pending approval. He explained that the standards require apprentices to accumulate a set number of hours of on-the-job training, to complete required classes, and to possess the required tools before advancing in the apprenticeship program.

The record shows that Painters' apprenticeship program also requires its apprentices to complete a significant amount of class time and on-the-job training. Painters further points out that its apprenticeship program is the only one approved by the State to provide apprentices on public works projects in Los Angeles County.

Thus, the record shows that both groups of employees complete apprenticeship programs that provide extensive training relevant to the work in dispute. As such, we find that this factor favors neither group of employees.

5. Economy and efficiency of operations

Carpenters contends that this factor favors an award to employees it represents. In support, Carpenters relies on Teper's testimony that he believes Carpenters is a "stronger" union than Painters, that Carpenters offers a larger pool of workers for the Employer to utilize for its jobs, and that Carpenters-represented employees could go to "multiple different companies" to get work if the Employer is slow. Painters contends that this factor favors an award to employees it represents because it can supply a large pool of employees who are skilled and trained in the Employer's work.

We find that the record does not contain sufficient evidence to find that the factor of economy and efficiency of operations favors one group of employees over the other.

Conclusion

After considering all the relevant factors, we conclude that employees represented by Carpenters are entitled to perform the work in dispute. We reach this conclusion relying on the factors of collective-bargaining agreements and employer preference and past practice. In making this determination, we are awarding the disputed work to employees represented by Carpenters, not to that labor organization or its members.

F. Scope of the Award

The Employer and Carpenters request a broad areawide award covering the work in dispute. The Board customarily does not grant a broad areawide award in cases where the charged party represents the employees to whom the work is awarded and to whom the employer contemplates continuing to assign the work. See, e.g., *Laborers Local 243 (A. Amorello & Sons)*, 314 NLRB 501, 503 (1994).[17] Accordingly, we shall limit the present determination to the particular controversy that gave rise to the proceeding.

DETERMINATION OF DISPUTE

The National Labor Relations Board makes the following Determination of Dispute.

Employees of Tangram Flooring, Inc., represented by Southwest Regional Council of Carpenters, Southern California Conference of Carpenters, United Brotherhood of Carpenters & Joiners of America, are entitled to perform the work of flooring installation being performed at the Legacy Apartments/The W Hotel in Hollywood, California.

Dated, Washington, D.C. November 6, 2009

Wilma B. Liebman, Chairman

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[17] Carpenters cites *Carpenters (Standard Drywall))*, 348 NLRB 1250, 1256 (2006), as precedent for granting an areawide award where the charged party represents the employees to whom the work is awarded. However, the parties in that case had been involved in a prior 10(k) proceeding, and the non-charged party was maintaining a lawsuit against the employer, which amounted to a continuing claim for the assignment of work to employees it represents. Id. Those circumstances are not present in this proceeding.